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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United Food & Commercial Workers Local 99, et al.,

Plaintiffs,

- and –

Arizona Education Association, et al.

Plaintiff-Intervenors,

vs.

Ken Bennett, in his capacity as Secretary of State of the State of Arizona, et al.,

Defendants.

Case No: CV11-921-PHX-GMS

DEFENDANTS' RESPONSE TO PLAINTIFF-INTERVENORS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: SB 1365

Introduction

The statute created by SB 1365, A.R.S. § 23-361.02, does not restrict speech and, in any event, it furthers a compelling state interest. Plaintiff-Intervenors' First Amendment challenge to the law should therefore be rejected, and their other contentions are also without merit. Accordingly, Plaintiff-Intervenors' Motion for Partial Summary Judgment on SB 1365 should be denied.

I. LEGAL ARGUMENT

A. First Amendment

1. The State's Compelling Interest

Before addressing what degree of scrutiny should be applied, we believe it is important to identify and examine the interest served by the statute. The statute protects employees from having their wages taken and used for political purposes without their consent. Employees should be able to make up their own minds about what political causes to support, or whether to contribute money for political purposes at all. By providing for affirmative consent, SB 1365 ensures that employees' political contributions are truly voluntary.

A core principle of the First Amendment is that one has the freedom to believe as one chooses. The First Amendment protects the right of individuals not only to make political contributions but also to refrain from making them. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977); *Miller v. Michigan State AFL-CIO*, 103 F.3d 1240, 1251, 1253 (6th Cir. 1997). The Supreme Court has frequently recognized that individuals may not be required to subsidize political causes they disagree with and has indicated that safeguards are needed to protect the right not to speak. *E.g., Knox v. SEIU*, 132 S. Ct. 2277 (2012); *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

The Intervenors ignore and denigrate the interests served by SB 1365. This is strange, given that they represent employee interests and also that they have invoked the First Amendment. Suffice it to say there are First Amendment interests on both sides. SB 1365 protects the right of individual employees to speak or not speak, and it does not prohibit the right of unions to speak.

The Intervenors suggest that union members agreed to pay dues, and so employee consent is uncalled for. But most employees who join unions do it for economic reasons; they believe the unions can get them better wages, benefits, and working conditions. More to the point, a willingness to join a union does not constitute a

knowing consent to contribute money for political purposes. The forms unions use to obtain authorization to deduct dues give no hint that any of the dues will be used for political purposes. (DSOF 2.) There is a separate authorization form for contributions to a union's political action committee. (DSOF 4.) Any reasonable person viewing the two forms would assume that the dues are for representational activities and contributions to the union's PAC are for political purposes. Moreover, many union members choose not to contribute to the union's PAC. (DSOF 6, 9, 27.) In addition, at least one union involved in this case has stated publicly that "Arizona state employees' dues monies are not used for political purposes." (DSOF 12.) All of this suggests that while there are some union members who want to give some of their pay to political causes, there are others who do not. It also indicates that union members are not told whether, or how much, their dues are going toward political purposes. SB 1365 would provide transparency.

2. Content and Viewpoint Neutrality

The Intervenors claim that SB 1365 discriminates on the basis of content, viewpoint, and speaker identity and ask the Court to apply strict scrutiny. (Doc. 156 at 10.) As discussed above, the state's compelling interest in assuring that money is not taken from employees and used for political purposes without their knowledge and consent is sufficiently compelling to survive even strict scrutiny. Nevertheless, strict scrutiny does not apply.

In a facial challenge, determining whether a law is content- or viewpoint-based must be determined from the text of the statute. The statute here provides that an "employer shall not deduct any payment from an employee's paycheck for political purposes unless the employee annually provides written or electronic authorization to the employer for the deduction." A.R.S. § 23-361.02(A). A law that requires affirmative authorization for political deductions does not distinguish between viewpoints.

The Intervenors argue that the statute is underinclusive. For a statute to be unconstitutional underinclusive, it must be so pierced by exceptions and inconsistencies

as to break the link between the effect of the law and the law's objective. *See Vanguard Outdoor LLC v. City of Los Angeles*, 648 F.3d 737 (9th Cir. 2011). The objective of SB 1365 is to help ensure that money is taken from employees' paychecks and used for political purposes only with their knowledge and consent. The entity statement and authorization requirement are designed to achieve this objective. The exemptions in the statute do not cast down on this justification; they are for organizations that don't spend money for political purposes (such as 501(c)(3) charitable organizations) or for expenditures that the employee must expressly consent to (separate segregated PACs).

Citizens United v. FEC, 130 S. Ct. 876 (2010), also does not require a difference conclusion. There, the Supreme Court let stand a statutory ban on corporate and union contributions to political candidates but struck down a ban on independent expenditures. *Id.* at 913. But *Citizens United* involved an outright ban on political speech based on corporate identity. By contrast, SB 1363 places no ban or limit on speech by unions. Unions would remain free to engage in political speech.

3. Disclosure

If not strict scrutiny, then what? In *Citizens United*, the Supreme Court invalidated the ban on independent expenditures by corporations and unions but said that contributions may be subject to disclosure. Disclosure requirements "may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking." *Id*. at 914. Disclosure requirements are reviewed under an exacting scrutiny standard; they must be substantially related to a sufficiently important governmental interest. *Id*.

On a superficial level, SB 1363 might look like a disclosure law. It calls for an entity that receives a payroll deduction for multiple purposes to provide a "statement indicating that the payment is not used for political purposes or a statement that indicates the maximum percentage that is used for political purposes." A.R.S. § 23-361.02(B). But the disclosure requirements referred to in *Citizens United* are those identifying the names of certain contributors and amounts. The entity statements required under SB

1365 do not require disclosure of such information and should not be treated as a disclosure law.

4. Failure to Assist Speech

The First Amendment does not require the State to provide payroll deduction for unions representing State employees, or for unions in general. *Ysursa v. Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009); *Arkansas State Highway Employees*, 628 F.2d 1099 (8th Cir. 1980). In *Ysursa*, the Court ruled that Idaho's ban on payroll deductions for political purposes was not an abridgement of union speech but failure to assist speech reviewable under a rational basis standard. *Id* . at 1098. Although SB 1365 merely regulates, rather than bans, payroll deductions for political purposes, it too should be analyzed as a failure to assist speech was a failure to assist speech. The state's interest in protecting employees is clearly rational.

Citing to a footnote in *Ysursa* and this Court's preliminary injunction ruling, Intervenors argue that SB 1363 is not evenhanded should be reviewed under a different standard. (Doc. 156 at 11-12.) But the footnote in *Ysursa* was addressing the possibility that the ban "may not be *applied* evenhandly," and it noted that the unions could bring an as-applied challenge. 129 S. Ct. at 1099 n.3 (emphasis added). As discussed above, SB 1365 does not on its face distinguish between viewpoints or messages. Consequently, any concerns about evenhandedness are premature.

B. Equal Protection

The Intervenors argue in the alternative that SB 1365 violates the Equal Protection Clause. (Doc. 156 at 13.) The Equal Protection Clause is violated only by pruposeful discrimination. *Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979). A classification involving neither a fundamental right nor a suspect class must be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 132 U.S. 2073, 2080 (2012) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). Rational basis review requires deference to reasonable underlying legislative judgments. *Id.*

The Intervenors' equal protection argument focuses § 23-361.02(H). This subsection excludes "any public safety employee" from the definition of employee. Intervenors allege that as a result of this definition, "no public safety employee union that obtains dues through payroll deductions from public safety members is required to comply with these provisions." (Doc. 156 at 4.) This is a factual allegation, yet there is no citation to any facts in the record to support it. There is no provision in the statute that excludes public safety *unions*. There is also nothing in the record to suggest that public safety unions would be excluded. In fact, the evidence of record suggests the opposite. There are a number of unions representing state employees that obtain dues via payroll deduction. Based on the employee classifications that pay the dues, it appears that the membership of most if not all of these unions include some who are public safety employees and some who are not. (DSOF 20-26 [Doc. 161].) If the statute were in effect, these unions would all be expected to submit entity statements indicating whether they used any of the dues collected for political purposes, though public safety members would not have to consent.

More important, the exclusion of public safety employees evinces no discriminatory purpose. The exclusion was added to SB 1365 by way of amendment, and the amendment did not change what the law would mean to other employees and entities. Put another way, the features of the statute to which the Intervenors object were in the legislation before the amendment, so the challenged classification could not have been adopted to discriminate against the Intervenors' viewpoint.

In any case, the exclusion has several rational bases. First, the exclusion of public safety employees avoids the possibility of division in the rank and disruption of the workplace. Disagreement over whether to consent to deductions for political purposes could turn officer against officer.

Second, the exclusion reduces administrative burdens for local governments, where public safety employees typically make up most of the work force, because fewer employees would be required to authorize deductions

C. Vagueness

The Intervenors next argue that SB 1365 is unduly vague. (Doc. 156 at 14-16.) A statute can be impermissibly vague if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or if it authorizes or encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Because SB 1365 does not prohibit any speech, the vagueness doctrine really has no application here. *See National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (refusing to apply vagueness analysis to statute providing funding for arts since statute would not likely compel anyone to steer clear of any forbidden area of expression).

The Intervenors' vagueness challenge focuses on the statute's definition of "political purposes." In particular, the Intervenors note that the definition encompasses "political issue advocacy," which they maintain could apply to "matters relating to passage or defeat of legislation" and other matters. They purport to be worried that even their traditional collective bargaining activities might be construed as political issue advocacy.

The term "political issue advocacy" is not at all vague. Words in a statute are known by the company they keep. *United States v. Kimsey*, 668 F.3d 691, 701 (9th Cir. 2012). In SB 1365, "political purposes" is defined as "supporting or opposing any candidate for public office, political party, referendum, initiative, political issue advocacy, political action committee, or other similar group." A.R.S. § 23-361.02(I). This definition describes forms of direct and indirect participation in political and election campaigns. It does not cover lobbying or collective bargaining activities but only activities relating to political campaigns. In this context, "political issue advocacy" refers to money spent by an entity to communicate its view on campaign issues but does not expressly advocate the election or defeat of a candidate.

Moreover, "words that have acquired a specialized meaning in the legal context must be accorded their legal meaning." *Buckhannon Bd. and Care Home, Inc. v. West*

Virginia Dep't of Health, 532 U.S. 598, 616 (2001); *see also In re Marriage of Williams*, 219 Ariz. 546, 549, ¶ 13, 200 P.2d 1043, 1046 (App. 2008) (stating that "when certain words have acquired such a specialized meaning in the law, the legislature has instructed us to construe those words accordingly"); A.R.S. § 1-213. The term "issue advocacy" has long been used in the campaign finance context as a category distinct from "express advocacy." *See FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

The Intervenors also contend that the phrase "political action committee *or other similar group*" is vague. As is apparent from the context, "or other similar group" is a catch-all term encompassing any committee or organization that takes in money and spends it on elections.

The terms "political issue advocacy" and "other similar group" are not vague. They can be readily understood with reference to the neighboring words in the definition of "political purposes." If there is any question regarding the construction of this provision, this Court should certify the question to the Arizona Supreme Court for an authoritative interpretation.

D. Unconstitutional Conditions

Finally, the Intervenors argue that SB 1365 imposes an unconstitutional condition on a government benefit. (Doc. 156 at 16-17.)

In *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), a non-profit corporation engaged in lobbying for the public interest challenged the denial of tax exempt status under § 501(c)(3) of the Internal Revenue Code. That section granted tax exemption to corporations and foundations organized for charitable, scientific, and certain other purposes so long as the organization's activities did not substantially involve "carrying on propaganda, or otherwise attempting to influence legislation" and the organization did not participate in "any political campaign on behalf of any candidate for public office." *See* 26 U.S.C. § 501(c)(3). The non-profit corporation argued that the prohibition on substantial lobbying imposed an unconstitutional condition on the receipt of tax-deductible contributions. The Supreme Court rejected this claim, reasoning that

Congress had not prohibited the corporation from lobbying but had merely refused to subsidize the lobbying activities. 461 U.S. at 545-46; *see also Legal Aid Society of Hawaii v. Legal Svcs. Corp.*, 145 F.3d 1017, 1026-27 (9th Cir. 1998) (holding that regulations allowing legal aid organization accepting federal funds to conduct restricted First Amendment activities through separate entity and with separate personnel did not impose unconstitutional condition).

Courts have also rejected claims that laws similar to SB 1365 impose unconstitutional conditions. *E.g.*, *Alabama Educ. Ass'n v. Bentley*, _____ F.Supp.2d _____, 2011 WL 1484077, *18-20 (D. Ala. 2011) (finding that teachers union did not show probability of success on claim that statute prohibiting payroll deductions for membership dues if used at all for political purposes imposed unconstitutional condition); *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 321 (6th Cir. 1998) (holding that Ohio statute prohibiting public employers from administering payroll deductions for political purposes did not impose unconstitutional condition).

Here, the Intervenors contend that SB 1365 would force them either to stop spending money for political purposes or to put a ceiling on their political expenditures. But the Act does not prohibit or restrict political spending at all, and the Intervenors cannot plausibly claim that it would require them to cease First Amendment activities. The statute would permit all covered entities to spend as much as they want on politics. It is true that they might have to state the percentage of money collected to be used for political purposes, but that is much different from a ban or limit on spending. In allowing payroll deduction, the State is entitled to define procedures and limits. SB 1365 does not impose unconstitutional conditions on First Amendment rights.

II. CONCLUSION

For the foregoing reasons, Plaintiff-Intervenors' motion (doc. 156) should be denied, the preliminary injunction should be lifted, and § 23-361.02 should be allowed to take effect.

Respectfully submitted this 6th day of September, 2012.

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s/Michael K. Goodwin
Michael K. Goodwin
Assistant Attorney General
Attorneys for Defendants

I hereby certify that on September 6, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants.

s/Michael Goodwin
Attorney General Secretary
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